Supreme Court, U.S.
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No. 14-275

IN THE

Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the government's "categorical duty" under the Fifth Amendment to pay just compensation when it "physically takes possession of an interest in property," *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012), applies only to real property and not to personal property.

2. Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion.

3. Whether a governmental mandate to relinquish specific, identifiable property as a "condition" on permission to engage in commerce effects a per se taking.

RULE 14.1(b) STATEMENT

Petitioners are Marvin D. Horne and Laura R. Horne, d.b.a. Raisin Valley Farms, a partnership, and d.b.a. Raisin Valley Farms Marketing Association, a.k.a. Raisin Valley Marketing, an unincorporated association; Marvin D. Horne; Laura R. Horne; the Estate of Don Durbahn, and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards, a partnership, plaintiffs-appellants below.

Respondent is the United States Department of Agriculture, defendant-appellee below.

RULE 29.6 STATEMENT

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 14.1(b) STATEMENT ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 4

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

A. Statutory And Regulatory Framework 5

B. The Hornes' Attempt To Comply Without Suffering Confiscation Of Their Raisins 9

C. Administrative Proceedings 11

D. Judicial Proceedings 13

SUMMARY OF ARGUMENT 17

ARGUMENT 20

I. THE RAISIN MARKETING ORDER WORKS A PHYSICAL TAKING FOR WHICH JUST COMPENSATION IS CATEGORICALLY REQUIRED. 20

A. The Raisin Marketing Order Works An Uncompensated Physical Taking Of Reserve-Tonnage Raisins. 21

B. The Procedural Posture Of This Case Does Not Make The Raisin Marketing Order Any Less A Categorical Taking..... 27

II. THE NINTH CIRCUIT'S REASONS NOT TO FIND A CATEGORICAL TAKING ARE WITHOUT MERIT. 31

A. The Fifth Amendment's Categorical Duty To Compensate Physical Takings Applies To Takings Of Personal Property. 31

1. The panel's decision contradicts this Court's binding precedent. 33

2. The panel's decision is inconsistent with the Takings Clause's history and text. 36

3. The panel's rationale misconstrues *Loretto* and *Lucas*. 39

B. The Fifth Amendment Does Not Allow The Government To Avoid Its Categorical Duty By Pointing To Speculative Benefits. 42

C. The Fifth Amendment Does Not Permit Confiscations Of Private Property To Be Recast As Permissible Use Restrictions. 48

CONCLUSION 57

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Spear,
356 F.3d 651 (6th Cir. 2004) 35

Arkansas Game & Fish Commission v. United States,
133 S. Ct. 511 (2012) 2, 3, 17

Armstrong v. United States,
364 U.S. 40 (1960) 34, 46

Bassett, New Mexico LLC v. United States,
55 Fed. Cl. 63 (2002) 26, 46

Bauman v. Ross,
167 U.S. 548 (1897) 45

Blanchette v. Connecticut General Insurance Corps.,
419 U.S. 102 (1974) 45

Brown v. Legal Foundation of Washington,
538 U.S. 216 (2003) 34, 35, 40

Casitas Municipal Water District v. United States,
543 F.3d 1276 (Fed. Cir. 2008) 45, 51

Cerajeski v. Zoeller,
735 F.3d 577 (7th Cir. 2013) 35

City of Monterey v. Del Monte Dunes at Monterey, Ltd.,
526 U.S. 687 (1999) 53

Dolan v. City of Tigard,
512 U.S. 374 (1994) 17, 50, 53, 54, 55, 56

Dugan v. Rank,
372 U.S. 609 (1963) 22

Eastern Enterprises v. Apfel,
524 U.S. 498 (1988) 28

Evans v. United States,
74 Fed. Cl. 554 (2006) 5, 6, 7, 23, 52

Fuentes v. Shevin,
407 U.S. 67 (1972) 39

Gulf Power Co. v. United States,
187 F.3d 1324 (11th Cir. 1999) 45, 50

Horne v. USDA,
133 S. Ct. 2053 (2013) . 1, 2, 3, 9, 10, 11, 12, 14, 22, 27, 28, 29, 57

Johanns v. Livestock Marketing Association,
544 U.S. 550 (2005) 21

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 24, 44, 51, 56

Kimball Laundry Co. v. United States,
338 U.S. 1 (1949) 34

Kohl v. United States,
91 U.S. 367 (1875) 37

Koontz v.
St. Johns River Water Management District,
133 S. Ct. 2586 (2013) 16, 19, 25, 28, 29, 34, 48, 50, 52, 53, 54

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 41, 48, 53

Lion Raisins, Inc. v. United States,
416 F.3d 1356 (Fed. Cir. 2005) 24

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982)...19, 22, 24, 32, 39, 40, 41, 42, 44, 49, 50, 51, 52, 55, 56, 57

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992).....32, 39, 41, 42, 43, 51

McIntyre v. Ohio Elections Commission,
514 U.S. 334 (1995).....30

Missouri Pacific Railway Co. v. Nebraska,
217 U.S. 196 (1910).....30

Monongahela Navigation Co. v. United States,
148 U.S. 312 (1893).....46

Nixon v. United States,
978 F.2d 1269 (D.C. Cir. 1992).....34, 35, 39

Nollan v. California Costal Commission,
483 U.S. 825 (1987).....17, 50, 52, 53, 54, 55

Otay Mesa Property, L.P. v. United States,
670 F.3d 1358 (Fed. Cir. 2012).....42

Penn Central Transportation Co. v. City of New York,
438 U.S. 104 (1978).....16, 32

Philip Morris, Inc. v. Reilly,
312 F.3d 24 (1st Cir. 2002).....35

Porter v. United States,
473 F.2d 1329 (5th Cir. 1973).....35

R & J Holding Co. v. Redevelopment Authority of the County of Montgomery,
670 F.3d 420 (3d Cir. 2011).....42

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984).....52

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) 18, 42, 44, 46

Union Pacific Railroad Co. v. Public Service Commission of Missouri, 248 U.S. 67 (1918) 50, 52

United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977) 34

United States v. Burnison, 339 U.S. 87 (1950) 33

United States v. Causby, 328 U.S. 256 (1946) 25, 41

United States v. Corbin, 423 F.2d 821 (10th Cir. 1970) 35

United States v. General Motors Corp., 323 U.S. 373 (1945) 22, 25, 33, 39, 41

United States v. Palmer, 128 U.S. 262 (1888) 33, 39

United States v. Pewee Coal, 341 U.S. 114 (1951) 25

United States v. Russell, 80 U.S. 623 (1871) 25, 33, 39

United States v. Ruzicka, 329 U.S. 287 (1946) 12

United States v. United Mine Workers, 330 U.S. 258 (1947) 24

Village of Norwood v. Baker, 172 U.S. 269 (1898) 29, 46

Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280 (7th Cir. 1993) 35

Washington Legal Foundation v. Legal Foundation of Washington, 271 F.3d 835 (9th Cir. 2001) 40

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 18, 33, 39

Wilkie v. Robbins, 551 U.S. 537 (2007) 30

Yee v. City of Escondido, 503 U.S. 519 (1992) 25, 52, 53

Statutes and Regulations

28 U.S.C. § 1254 4

28 U.S.C. § 1291 4

28 U.S.C. § 1331 4

7 C.F.R. § 989.15 6

7 C.F.R. § 989.166 ..... 6, 12

7 C.F.R. § 989.21 6

7 C.F.R. § 989.26-.39 21

7 C.F.R. § 989.53 ..... 7, 24

7 C.F.R. § 989.54 ..... 5, 6, 13, 21

7 C.F.R. § 989.55 5

7 C.F.R. § 989.65 5

7 C.F.R. § 989.66 ..... 5, 12

7 C.F.R. § 989.66(a) 6, 22

7 C.F.R. § 989.66(b)(1) 6
7 C.F.R. § 989.66(b)(2) 22
7 C.F.R. § 989.66(b)(4) 6, 7, 22
7 C.F.R. § 989.66(f) 6, 22
7 C.F.R. § 989.66(g) 7, 22
7 C.F.R. § 989.66(h) 7, 24
7 C.F.R. § 989.67(b) 22
7 C.F.R. § 989.67(b)(2) 7
7 C.F.R. § 989.67(b)(3) 7
7 C.F.R. § 989.67(b)(4) 7
7 C.F.R. § 989.67(c) 7, 22
7 C.F.R. § 989.67(d) 7, 22
7 C.F.R. § 989.67(e) 7, 22
7 C.F.R. § 989.80(a) 13
7 U.S.C. § 601 4
7 U.S.C. § 608a 6
7 U.S.C. § 608c(14) 6
7 U.S.C. § 608c(14)(B) 13
7 U.S.C. § 608c(19) 5
7 U.S.C. § 608c(6)(E) 7, 24

Constitutional Provisions

U.S. Const. amend. V 4, 39
U.S. Const. amend. XIV 39
U.S. Const. art. 4, § 3, cl. 2 39

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Baude, William,
Rethinking the Federal Eminent Domain Power,
122 Yale L.J. 1738 (2013) 37

Cooley, Thomas M.,
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(Philip B. Kurland & Ralph Lerner eds., 1987)..36

Johnson, Samuel,
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(6th ed. 1785).....38

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Madison, James,
Property (1792), *reprinted in The Papers of James Madison* (R. Rutland ed., 1977).....38

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reprinted in A.E. Dick Howard, *Magna Carta: Text and Commentary* (1964) 37

Malcolm, Dan,
California Raisin Growers Benefit from Sun-Maid Work, Am. Vineyard, Jan. 2015.....9

Michelman, Frank,
Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,
80 Harv. L. Rev. 1165 (1967).....41

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(3d ed. 2014) 33, 45

Raisin Administrative Committee,
Analysis Report (Aug. 1, 2006) 8

Raisin Administrative Committee,
Marketing Policy and Industry Statistics, 2010
(Jan. 6, 2011) 7

Raisin Administrative Committee,
Statement of Disposition & Grower Equity
(Apr. 1, 2011) 8

Raisin Administrative Committee,
Statement of Disposition & Grower Equity
(Feb. 19, 2009) 9

Raisin Administrative Committee,
Statement of Disposition & Grower Equity
(Jan. 31, 2013) 8

Rubenfeld, Jed,
Usings, 102 Yale L.J. 1077 (1993) 37

Treanor, William Michael,
The Original Understanding of the Takings Clause and the Political Process,
95 Colum. L. Rev. 782 (1995) 38

Tucker, Henry St. George,
Blackstone's Commentaries (1803) 36

Webster, Noah,
American Dictionary of the English Language
(1828) 38

INTRODUCTION

This case returns to the Court for a second time. Two years ago, the Court unanimously reversed a Ninth Circuit holding that the district court lacked jurisdiction to consider Petitioners' Takings Clause defense. Pet.App. 220a; *Horne v. USDA*, 133 S. Ct. 2053, 2056 (2013) ("*Horne I*").[1] On remand to the same panel, the Ninth Circuit held that the expropriation of thousands of tons of raisins, which the government is then free to sell or give away in its absolute discretion, is not a per se taking and does not require compensation. We ask this Court again to reverse.

Petitioners are a family of California raisin farmers. They are challenging an order of the United States Department of Agriculture ("USDA") issued pursuant to regulations known as the Raisin Marketing Order (or "Marketing Order"). Under the Marketing Order, the USDA requires "handlers" of raisins to set aside portions of the raisins they obtain from raisin producers, and to transfer them to the government. In the two years at issue in this case, 2002-2003 and 2003-2004, the USDA required transfer of 47 percent and 30 percent of each producer's crop, respectively. Raisin handlers who do not comply — including Petitioners here — are required to pay to the government the dollar value of the raisins, plus large punitive fines.

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[1] Citations to the Joint Appendix are to "JA." Citations to the Petition Appendix are to "Pet.App." Citations to Petitioners' Supplemental Appendix, attached to Petitioners' Reply to Brief in Opposition, are to "Supp.App."

The Ninth Circuit correctly recognized the Order as a transfer of "possessory and dispositional control" of reserve-tonnage raisins from private owners to the government. Pet.App. 25a-26a. And actual physical takings of property for government use implicate the Fifth Amendment's "categorical" rule of just compensation. *See Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012). Yet the USDA paid farmers like the Hornes nothing at all for their 2003-04 raisins, and far less than the cost of production for their 2002-03 raisins. As the court below perceived, these uncertain and insufficient payments are not "just compensation" within the meaning of the Fifth Amendment. Pet.App. 21a-22a & n.16. The regulations at issue are, in short, a textbook case of an uncompensated per se taking.

The panel's opinion on remand held nonetheless that the Marketing Order's compelled transfer of raisins or their dollar equivalent is merely a "use restriction," subject to the watered-down balancing tests for "regulatory" rather than actual physical takings. Pet.App. 1a. The panel assumed at the threshold that "paradigmatic" takings caselaw does not apply in cases where no property has *yet* changed hands, Pet.App. 15a, even though, as this Court held in *Horne I*, the applicable federal statute permits handlers to raise the Takings Clause as a *defense* before the claimed taking is enforced. The panel then reasoned, first, that the categorical compensation rule for seizures of property applies only to real property, not to personal property (like raisins), and second, that even if that categorical rule could have applied to raisins, it does not apply here because the USDA theoretically offers raisin producers something in return (never mind that the return is

often nothing at all). Each of those steps — and the panel's ultimate conclusion that the Marketing Order is a use restriction subject only to a balancing test — contradicts well-settled takings doctrine.

The seriousness of the panel's departures from established law is difficult to exaggerate. If it were really true that the government never faces a "categorical duty" of just compensation when it takes ownership of a person's movable property, *see Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518, then great swaths of valuable property (ranging from cars, to pills, to bank accounts, to securities, to patents) are outside the Takings Clause's categorical protection altogether. The panel's other holdings would empower the government in a broad array of contexts to avoid categorical compensation through procedural gimmickry: by offering a discretionary possibility of partial payment in return, by imposing a fine in lieu of property and waiting to execute until judicial review is exhausted, or by "conditioning" the right to do business on transferring property to the government. These holdings would largely annul the government's duty of just compensation, not just for raisins, but for all private property.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court is reported at 750 F.3d 1128. Pet.App. 1a. This Court's opinion is reported at 133 S. Ct. 2053. Pet.App. 242a. This Court's opinion reversed an earlier opinion of the court of appeals reported at 673 F.3d 1071. Pet.App. 220a. That opinion of the court of appeals itself superseded the court of appeals' original decision which was designated for publication, but was undesignated

upon the issuance of the court of appeals' second opinion. Pet.App. 191a, 260-61a. The opinion of the district court is unpublished, and is electronically reported at 2009 WL 4895362. Pet.App. 125a.

The district court reviewed three USDA administrative decisions. The first, by a USDA Administrative Law Judge ("ALJ"), is reported at 65 Agric. Dec. 805. Pet.App. 30a. The second, on administrative appeal to a USDA Judicial Officer ("JO"), is reported at 67 Agric. Dec. 18. Pet.App. 56a. A second JO decision on reconsideration is reported at 67 Agric. Dec. 1244. Pet.App. 101a.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 2014. Pet.App. 1a. This Court granted a timely petition for certiorari on January 16, 2015.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 1331.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The relevant provisions of the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 601 *et seq.*; and the *Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California*, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "Marketing Order"),

are reproduced in the appendix to the petition. *See* Pet.App. 262a-372a.

STATEMENT OF THE CASE

A. Statutory And Regulatory Framework

Under the AMAA, the USDA regulates the sale of certain agricultural products, including raisins, by promulgating "marketing orders." *See Evans v. United States*, 74 Fed. Cl. 554, 558 (2006). This case involves what one court has described as the most "draconian" of these schemes — the marketing order for California raisins, which constitute approximately 99 percent of the United States' and 40 percent of the world's raisin production. Pet.App. 225a n.7; *Evans*, 74 Fed. Cl. at 555. Unlike other marketing orders, which are periodically put to a vote of producers and terminated if they do not command a specified majority or super-majority, *see* 7 U.S.C. § 608c(19), the Raisin Marketing Order has never been put to an up-or-down revote of raisin producers since its first adoption in 1949.

The Raisin Marketing Order establishes a "reserve" program under which a specified portion of the yearly crop must be set aside "for the account of" the federal government. *Evans*, 74 Fed. Cl. at 557. While similar in some respects to other marketing orders, the Raisin Marketing Order is different in two primary ways: "[I]t effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Id.* at 558; *see also* 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66.

The raisin reserve program works as follows. Each year, the Raisin Administrative Committee ("RAC"), an agent of the USDA created by the Raisin Marketing Order, limits the percentage of raisins that may be sold in the market by dividing the raisin crop into "reserve tonnage" and "free tonnage" percentages. 7 C.F.R. §§ 989.66, 989.166. Free-tonnage raisins may be sold, while reserve-tonnage raisins must be set apart "for the account of" the RAC. §§ 989.65, 989.66(a), (b)(1). The handler must deliver the reserve-tonnage raisins to the RAC or its designee on demand, § 989.66(b)(4), and the RAC pays the costs of storage until then, § 989.66(f). Reserve percentages are established by (and unknown until) February 15 of each crop year, long after farmers have expended substantial resources for the cultivation and harvest of their crop for the year. §§ 989.21, 989.54(d).

The Marketing Order applies in theory only to "handlers" of raisins, a term defined at 7 C.F.R. § 989.15, but its real burdens fall on producers. In the ordinary case,[2] raisin farmers sell their crop to handlers, who process, pack, and sell the raisins to consumers. The handler has the legal obligation to set aside the reserve raisins, and the AMAA provides that any handler who violates a marketing order is subject to fines and penalties in a final USDA order. 7 U.S.C. §§ 608a(5), 608c(14); 7 C.F.R. § 989.166(c). But handlers pay producers only for the free-tonnage raisins. *Evans*, 74 Fed. Cl. at 557. They pay nothing for the reserve-tonnage raisins that they transfer to

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[2] We describe below the divergent business model followed by Petitioners.

the government. *Id.* Because the handler does not pay the producer for the reserve percentage of the crop, it is the producer who bears the economic burden of the program.

Once the RAC has control of the reserve-tonnage raisins, it may require their delivery to anyone chosen by the RAC to receive them, 7 C.F.R. § 989.66(b)(4), may obtain loans using reserve-tonnage raisins as security, § 989.66(g), may sell reserve-tonnage raisins to handlers for resale in export markets, §§ 989.67(c)-(e), or may direct that the raisins be sold or disposed of by direct sale or gift to United States agencies (for example, for school lunches), foreign governments, or charitable organizations, §§ 989.67(b)(2)-(4). Typically, the RAC sells most reserve raisins to exporters at less than the domestic price, using the proceeds to fund its own administrative costs and to subsidize export sales. *See* Supp.App. 1a-2a. As small independent producers, the Hornes do not engage in the export trade and thus do not benefit from these below-market sales and export subsidies. Unexpended proceeds, if any, must be remitted to producers on a pro rata basis, 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h), but many years there is nothing left to remit.

In the two crop years involved in this case, 2002-03 and 2003-04, the USDA required farmers to turn over 47 percent and 30 percent of their raisin crops respectively. *See* RAC, *Marketing Policy and Industry Statistics, 2010* 27 (Jan. 6, 2011), *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf (last visited Feb. 25, 2015). The reserve

raisins totaled more than 182,000 and 89,000 tons in those two years respectively. *See id.* at 25; Supp.App.1a-2a. In 2002-03, the farmers who produced those raisins were paid well below the cost of production, and considerably less than fair market value. *See* RAC, *Analysis Report* 22 (Aug. 1, 2006), *available at* http://www.raisins.org/analysis_report/analysis_report.pdf (last visited Feb. 25, 2015). In 2003-04, the government paid nothing at all for the raisins that it took and used. *See id.* at 23; *see also id.* at 55.[3]

The record in this case is confined to the two years in question, but according to RAC annual reports, there has been no raisin reserve for the last five years. In the last six years in which there was a raisin reserve, 2002-03 was the only year in which producers received any payment for their reserve raisins; in the five other years the payment was zero. *See* RAC, *Statement of Disposition & Grower Equity* (Jan. 31, 2013) (2008-09 reserve); RAC, *Statement of Disposition & Grower Equity* (Apr. 1, 2011) (2007-08

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[3] In 2002-03 the RAC gave away 2,145 tons of reserve raisins for school lunch programs and similar uses and sold 179,973 tons, largely to handlers for export, yielding $118,280,587 in revenues — an average of $649.47 per ton. Supp.App. 2a. The RAC spent $53,360,854 on export subsidies, and most of the rest on administrative expenses. Producers retained a "gross equity" of $272.73 per ton, prior to a deduction for advertising. *Id.*

In 2003-04 the RAC gave away 2,312 tons of reserve raisins and sold 86,732 tons, yielding $111,242,849, or $1,249.30 per ton. Supp.App. 1a. The RAC then spent $99,807,957 on export subsidies and *everything* else on advertising and administrative expenses, leaving nothing for the producers at all. *Id.*

reserve); RAC, *Statement of Disposition & Grower Equity* (Feb. 19, 2009) (2006-07 reserve); RAC, *Statement of Disposition & Grower Equity* (Feb. 19, 2009) (2005-06 reserve); Supp.App. 1a-2a (2002-03 and 2003-04).

B. The Hornes' Attempt To Comply Without Suffering Confiscation Of Their Raisins

The Hornes and the Durbahns ("the Hornes" or "Petitioners") are independent farmers in Fresno and Madera Counties in California. *Horne I*, 133 S. Ct. at 2058. Petitioners Marvin and Laura Horne have grown Thompson seedless grapes for raisins for nearly half a century, and Don and Rena Durbahn (Laura's parents), recently deceased, a generation longer. *Id.*; Pet.App. 33a.

Like many raisin farmers, the Hornes became increasingly frustrated with the workings of the Raisin Marketing Order, which they regard as "stealing [their] crop." Pet.App. 129a; *see also* Dan Malcolm, *California Raisin Growers Benefit from Sun-Maid Work*, Am. Vineyard, Jan. 2015, at 18-19 (reporting similar frustration from other growers in recent years). As the Hornes explained in a letter to the Secretary of Agriculture, "[t]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude." *Horne I*, 133 S. Ct. at 2058 n.3. After consulting with attorneys, university professors, and officials, the Hornes devised a new business model that they believed would allow them to comply with the law without having to set aside reserve raisins for the RAC. *Id.* at 2058.

In their new business model, the Hornes purchased their own equipment for processing and packing raisins. *Id.* That way, instead of selling their crop to a traditional handler, they could process their raisins themselves and sell them directly to wholesale customers such as food-processing companies and bakeries, eliminating the middleman. *Id.* Because the obligations of the Raisin Marketing Order apply only to "handlers," the Hornes believed they would not be required to disgorge the "reserve" portion of their raisin crop to the RAC. *Id.*

The Hornes allowed some 60 of their neighbors to lease this equipment for their own raisins for a per-ton fee. *Id.* The Hornes and their neighbors coordinated sales through the "Raisin Valley Farms Marketing Association," which connected prospective purchasers with producers on a rotational basis. *Id.*; Pet.App. 38a. Purchasers would remit the proceeds to the Raisin Valley Farms Marketing Association, which would then disburse payment to the producers, less the rental fee for use of the equipment. Pet.App. 38a-39a, 130a-131a. Accordingly, the producers who used the Hornes' equipment received full market price for their raisins, without having portions of their crop segregated and turned over to the government. The Hornes believed that because they did not purchase raisins from these other producers — but merely leased equipment and personnel — they were not "handlers" with respect to these raisins either.

Because they believed this way of operating would avoid the reserve requirement, the Hornes did not set aside reserve-tonnage raisins for 2002-03 and

2003-04, the two years relevant to this case, for either their own raisins or those of other producers who leased their equipment. Pet.App. 132a-133a; *Horne I*, 133 S. Ct. at 2059. The RAC believed otherwise. First, the RAC sent a truck to the Hornes' facility to seize the reserve raisins. JA29-30. Then, when the Hornes refused entry, the RAC issued a demand letter requiring the Hornes to pay the dollar equivalent. JA31-32; *see also* Pet.App. 41a, 69a; Transcript of Oral Argument at 32:2-:8, *Horne I*, 133 S. Ct. 2053 (No. 12-123) ("*Horne I* Tr."). The Hornes refused to comply with either the attempted seizure of raisins or the demand for cash.

C. Administrative Proceedings

On April 1, 2004, the Administrator of the Agricultural Marketing Service initiated an enforcement action within the USDA, claiming that Petitioners violated the AMAA. Pet.App. 30a-31a; *Horne I*, 133 S. Ct. at 2059. The Hornes defended on both statutory and constitutional grounds. They contended that under their innovative business model they were not "handlers in that they never obtained any raisins through purchase or transfer of ownership ... and argue[d], therefore, they did not *acquire* raisins within the meaning of the Raisin Order." Pet.App. 31a; *Horne I*, 133 S. Ct. at 2059. Their principal constitutional defense was that the requirement that they transfer possession of reserve raisins to the government without just compensation is an unconstitutional taking under the Fifth Amendment.

A USDA ALJ disagreed. Pet.App. 32a-33a; *Horne I*, 133 S. Ct. at 2059. The Hornes were held responsible as handlers of their own raisins as well

as the raisins produced by their neighbors, on the theory that the Hornes had "acquired" those raisins within Marketing Order' specialized terminology when the raisins arrived at the Hornes' processing facility. Pet.App. 47a-50a, 52a; *see also* Pet.App. 84a.

As to the Takings Clause defense, the ALJ reasoned that the requirement that Petitioners hand over their raisins to the USDA without compensation "cannot be used as grounds for a taking claim since handlers no longer have a property right that permits them to market their crop free of regulatory control." Pet.App. 45a; *Horne I*, 133 S. Ct. at 2059. Thus, the Hornes were fined the monetary equivalent of all the raisins processed in their facility, plus penalties. Pet.App. 53a-54a.

On appeal, a USDA JO affirmed. Pet.App. 98a-99a, 122a-123a; *Horne I*, 133 S. Ct. at 2059. The JO agreed with the ALJ that the Hornes had "acquired" all raisins processed at their facility and thus were handlers who had the legal obligation to set aside the reserve pool raisins. As to Petitioners' takings defense, the JO claimed that he had "no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture." Pet.App. 78a; *but see United States v. Ruzicka*, 329 U.S. 287, 294 (1946) (challenges under the AMAA "formulated in constitutional terms ... in the first instance must be sought from the Secretary of Agriculture").

The JO determined that, as "handlers," Petitioners violated 7 C.F.R. § 989.66 and § 989.166 by failing to hold reserve raisins for the 2002-03 and 2003-04 crop years. Pet.App. 97a-98a. The JO ordered Petitioners to pay $483,843.53, the dollar

equivalent of the raisins that should have been held in reserve for the 2002-03 (634,427 pounds) and 2003-04 (611,159 pounds) crop years, as determined by the "field price" typically paid to producers for free-tonnage raisins in those years (hereafter, the "dollar equivalent" component of the fine). Pet.App. 109a-110a, 123a; 7 C.F.R. § 989.54(b). The JO also ordered Petitioners to pay an additional $202,600 in civil penalties pursuant to 7 U.S.C. § 608c(14)(B), $177,600 of which was imposed for failure to comply with the reserve requirement (hereafter, the "penalty" component of the fine). Pet.App. 98a, 122a. The remaining $25,000 is not at issue in this petition. Finally, the JO imposed an additional $8,783.39 in unpaid assessments pursuant to 7 C.F.R. § 989.80(a), which also is not at issue here. Pet.App. 112a, 123a.

It is important to emphasize that Petitioners bore the entirety of both the dollar equivalent and penalty components of the fine, and that the fine covered both Petitioners' own raisins and those allegedly "acquired" from their neighbors who used Petitioners' equipment. The other producers received full market value for their crop and were not charged any part of the fine.

D. Judicial Proceedings

Petitioners sought review of the agency decision in the United States District Court for the Eastern District of California under 7 U.S.C. § 608c(14)(B). Again, they presented both their statutory argument that they were not handlers and their constitutional argument that the government's appropriation of reserve raisins would be an uncompensated per se

taking. The District Court granted summary judgment for the USDA. Pet.App. 189a-190a.

Petitioners appealed. On July 25, 2011, a panel of the Ninth Circuit affirmed the judgment in its entirety. After rejecting Petitioners' statutory argument, the panel held that no taking occurs under the regulatory scheme — and no compensation is required — when "the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Pet.App. 208a. After Petitioners filed a rehearing petition, the government argued — for the first time — that the court lacked jurisdiction over the takings issue. The government contended that the Hornes should be required to pay the fine in its entirety and sue in the Court of Federal Claims to get it back. On March 12, 2012, the panel filed a substitute opinion dismissing Petitioners' Takings Clause defense for lack of jurisdiction. Pet.App. 236a, 241a.

The Hornes petitioned this Court for certiorari, which was granted. On June 10, 2013, this Court unanimously reversed the Ninth Circuit and remanded for that court to reconsider Petitioners' arguments on the merits. The Court held that the fine was imposed on the Hornes in their capacity as handlers, *Horne I*, 133 S. Ct. at 2060-61, and that they were entitled to challenge its constitutionality in district court before being required to comply, *id.* at 2063-64.

On remand before the same panel, the court ordered limited supplemental briefing addressing the Supreme Court's opinion and relevant new authority. After oral argument, it issued a third opinion on May

9, 2014 affirming the district court, this time again on the merits.

The panel first considered and rejected the government's argument that the Hornes lack standing to challenge the USDA order as a taking because not all the raisins for which they were held responsible were the Hornes' property. Pet.App. 11a-12a. The court noted that the injury suffered by the Hornes was the imposition of a penalty for their refusal to "physically convey raisins to the RAC." Pet.App. 13a. This penalty included the "dollar equivalent" of all the raisins processed at the Horne's facility (whether the Hornes owned the raisins or not), plus a "civil penalty" for noncompliance. Pet.App. 8a n.6. The court explained that the USDA "specifically linked a monetary exaction (the penalty imposed for failure to comply with the Marketing Order) to specific property (the reserved raisins). The Hornes faced a choice: relinquish the raisins to the RAC or face the imposition of a penalty." Pet.App. 14a. Accordingly, the court reasoned that the constitutionality of the penalty turns on whether the underlying obligation of handlers to convey reserve raisins to the RAC would be a Fifth Amendment taking. If so, "the Secretary cannot lawfully impose a penalty for non-compliance. But if the receipt of raisins does not violate the constitution, neither does imposition of the penalty." Pet.App. 15a. This reasoning applied to all the raisins for which the Hornes were fined.

The panel then considered whether the Raisin Marketing Order effects a per se taking of Petitioners' property for which just compensation is categorically required. Observing that "the

government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account," Pet.App. 15a, it held that the Order did not effect a "paradigmatic" taking, and so entered what it called the "doctrinal thicket of the Supreme Court's regulatory takings jurisprudence," Pet.App. 16a.[4] The panel then supplied two reasons for determining that the Marketing Order does not implicate a categorical duty of compensation. First, the per se takings rule applicable when the government takes possession of property, in the panel's view, extends only to *real* property and does not "govern controversies involving personal property" such as raisins. Pet.App. 20a. Second, because the Hornes retained benefits flowing from use of the raisins by the RAC and a contingent right to the proceeds not spent by the RAC, "the Hornes did not lose all economically valuable use of their personal property." Pet.App. 20a-21a.[5]

After concluding that no per se taking had occurred, the panel characterized the Raisin

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[4] Petitioners had always been clear that they were not arguing a regulatory taking, but a per se taking. *See* Pls' Pet. for Rehr'g at 11, *Horne v. USDA*, No. 10-15270 (9th Cir. Sept. 8, 2011) ("[T]his is not a regulatory takings case."); *see also* Pls' Supp. Br. at 10, *Horne v. USDA*, No. 10-15270 (9th Cir. Jul. 23, 2013) ("In dismissing the Hornes' takings defense, the panel distinguished *regulatory* takings decisions. Under *Koontz*, however, the Hornes' defense must be evaluated under a '*per se* takings approach' rather than the more forgiving *Penn Central* test.") (citation omitted).

[5] The government did not raise either of the panel's theories in supplemental briefs or in oral argument, and it did not defend them in its Brief in Opposition before this Court.

Marketing Order as a use restriction rather than a physical taking, Pet.App. 25a, and considered whether the Raisin Marketing Order satisfied the "'nexus and rough proportionality'" rule applied to land-use exactions under this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Pet.App. 22a-23a. The Court held that it did, reasoning that there is "a sufficient nexus between the means and ends of the Marketing Order" and that "[t]he structure of the reserve requirement is at least roughly proportional ... to Congress's stated goal of ensuring an orderly domestic raisin market." Pet.App. 29a. The panel therefore concluded that the Raisin Marketing Order "do[es] not constitute a taking under the Fifth Amendment." *Id.* According to the panel, "it is to Congress and the Department of Agriculture to which the Hornes must address their complaints." *Id.*

The Hornes petitioned for certiorari a second time, which this Court granted once more.

SUMMARY OF ARGUMENT

The core protection of the Takings Clause is the requirement that the government must pay just compensation whenever it "physically takes possession" of "an interest" in property. *See Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518 (internal quotation omitted). This Court has referred to such appropriations as "per se," or "categorical," physical takings. Such a taking occurs (whether or not formal title passes) when the government takes possession of property for its own use or when it effects a permanent physical occupation of property.

This case falls squarely in this protected category: Each year the RAC, which is an agent of the USDA, demands that handlers physically set aside a percentage of the raisin crop, over which the RAC obtains complete dominion and control. The RAC can give the reserve raisins away; it can use them for collateral on a loan; and it can — and usually does — sell them. It then uses the proceeds in its discretion to fund its own administrative expenses as well as subsidies for raisin exporters. Only if money is left over do the producers receive anything for the raisins taken from them. That is a textbook example of an uncompensated per se taking.

Each of the three questions presented arises from the panel's attempts to redefine the compelled transfer of raisins as something other than a per se taking. The panel's reasons, in turn, all reflect a common flaw, namely, application of this Court's *regulatory* takings jurisprudence to a case involving the government's attempted *physical* seizure of raisins or their cash value. *See Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323-24 (2002) (explaining that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa"). And each contradicts more specific direction from this Court.

First, the panel's holding that per se physical takings are limited to real property and not to personal property contradicts a line of this Court's cases that have applied the per se takings rule to personal property, *see, e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980)

(applying Takings Clause to money earned as interest on an interpleader fund), and cannot be squared with text, purpose, or original understanding of the Takings Clause.

Second, the panel's holding that the Hornes did not suffer a per se taking because they benefitted from the Raisin Marketing Order and retained a theoretical right to any residual proceeds of the reserve raisins (even if they were zero) contradicts cases requiring compensation even when the owner of occupied property does retain an interest. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 & n.16 (1982).

Third, the panel's holding that the USDA's taking of title to the reserve-tonnage raisins should be analyzed as a mere restriction on the Hornes' use of the raisins in commerce directly contradicts this Court's explicit holding, reaffirmed recently in *Koontz*, that a seizure of ownership can never be justified in such terms. *See Loretto*, 458 U.S. at 439 n.17; *see also Koontz v. St. John's River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594-95 (2013) ("Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.").

The panel's errors are distinct, but they all threaten the same effect: They convert forced transfers of property ownership to the government into mere regulatory restrictions, subject only to weak balancing tests. A government seizure of personal property, according to the panel, is *never* more than a regulatory act. And under the panel's reasoning, the government could structure virtually any taking of any property whatsoever — even an

explicit confiscation of title and possession — as mere regulation, effectively eviscerating the per se takings rule that has protected property rights in the United States for centuries. This Court must not allow that to remain the law.

ARGUMENT

I. THE RAISIN MARKETING ORDER WORKS A PHYSICAL TAKING FOR WHICH JUST COMPENSATION IS CATEGORICALLY REQUIRED.

Presumably, no one would doubt that a physical taking had occurred if the RAC drove up to the Horne's farm in a truck and appropriated the reserve-tonnage raisins at gunpoint. Pet.App. 207a-208a. It is no different when the government defines the Hornes as a handler and requires them to deliver those same raisins on pain of a substantial fine. This case is procedurally unusual because the Hornes, thinking they had devised a legal alternative, refused to deliver the reserve raisins to the RAC and were required to pay the dollar equivalent instead, plus a civil penalty. But the difference is ultimately superficial, for this Court has explicitly held that a taking of money in lieu of identifiable property is a taking, and the imposition of a fine for refusing to comply with an order that would be an unconstitutional taking is also a violation of the Takings Clause.

As the Ninth Circuit correctly realized, the constitutionality of the fine imposed on the Hornes rises or falls on whether the underlying compelled transfer of raisins without just compensation is constitutional. *See* Pet.App. 15a. Since — as the Ninth Circuit also correctly realized — the Raisin

Marketing Order entails "the loss of possessory and dispositional control" over the reserve raisins, Pet.App. 25a-26a, it is a per se taking.

A. The Raisin Marketing Order Works An Uncompensated Physical Taking Of Reserve-Tonnage Raisins.

As this Court's previous brush with this case demonstrated, the procedural context of this case is complicated — but the basic structure of the Raisin Marketing Order is not. Simply put, the Marketing Order physically deprives raisin producers of a large portion of their raisin crop and compels transfer of those raisins to the RAC, the agent of the USDA, without just compensation.[6] Unlike some better-known agricultural programs, the Marketing Order is not merely a regulation of the quantity of raisins that producers may grow or take to market. It goes an additional step: It compels transfer of the reserve raisins to the government, for the government's own use or sale. It is that extra step that makes the Marketing Order a per se taking.

Simply describing the Marketing Order makes the point. Raisin producers give up physical possession of reserve-tonnage raisins, and raisin handlers must store those raisins "separate and apart" from free-tonnage raisins, "for the account of"

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[6] No one disputes that the RAC is an agent of the federal government. *Cf. Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-62 (2005) (speech by beef marketing order committee qualifies as "government speech"). USDA regulations create the RAC, determine its membership, establish its powers, and set its internal procedures. *See* 7 C.F.R. §§ 989.26-.39, 989.54.

the RAC. 7 C.F.R. §§ 989.66(a), (b)(2). Although handlers physically maintain the reserve-tonnage raisins at first, the RAC pays the costs of storage. § 989.66(f). The handler must deliver the reserve-tonnage raisins to the RAC or its designee on demand. § 989.66(b)(4). Once the reserve is set and the reserve-tonnage raisins are segregated, power to dispose of those raisins lies entirely with the RAC. The RAC may use the raisins as collateral for loans, § 989.66(g), and it can sell or give them away at its discretion, §§ 989.67(b)-(e). Some are used for public purposes such as school lunches. *Horne I*, 133 S. Ct. at 2058. The vast majority are sold to certain handlers for export. The RAC uses the proceeds from sale of reserve raisins to fund its own administrative costs as well as export subsidies — the largest use of RAC revenues — which enable raisin exporters to make a profit despite the gap between U.S. market prices and global prices. The Hornes are not exporters, and receive no benefit from these gifts, sales, or subsidies.

From the growers' perspective, the effect of the Raisin Marketing Order is to deprive them of the right "'to possess, use and dispose of'" their raisins and to hand that right over to the United States. *See Loretto*, 458 U.S. at 435 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)); *Dugan v. Rank*, 372 U.S. 609, 614, 616 (1963) (physical taking where government diverted water in which landowners had riparian and other water rights). The Ninth Circuit accurately described this as the "loss of possessory and dispositional control" of the reserve raisins. Pet.App. 25a-26a.

The RAC's authority under federal law to demand that reserve raisins be physically segregated and delivered, and then to use and dispose of the raisins at its discretion, is sufficient to establish a physical taking for which just compensation is categorically required. That authority distinguishes the Raisin Marketing Order from regulatory schemes that simply restrict when agricultural products may be sold, how many, or in what markets. Such regulations could raise *regulatory* takings concerns (especially if they eliminate all the value of the product), but they would not implicate the categorical rule applicable when the government takes an interest in property for itself.

Until its Brief in Opposition in this Court, the government routinely described the Raisin Marketing Order as requiring the transfer of "title" to the reserve raisins to the RAC, even though the precise term "title" does not appear in the AMAA. For example, the Assistant to the Solicitor General informed this Court at oral argument that "the title to the reserve raisins passes as a matter of law from the producer to the Raisin Administrative Committee." *Horne I* Tr. 45:17-:24; *see also* U.S. Br. at 43, *Horne v. USDA*, No. 10-15270 (9th Cir. Jul. 21, 2010) (arguing that "'passing title ... to the RAC'" is an "'admission ticket'" to the raisin market) (quoting *Evans*, 74 Fed. Cl. at 563). That is consistent with the legal analysis of the district court below, Pet.App. 179a ("Title to the 'reserve tonnage' portion of the producer's raisins automatically transfers to the RAC[.]"), and of other federal courts that have considered the Marketing Order. *See Evans*, 74 Fed Cl. at 558 (explaining that the Raisin Marketing Order "stands out from most of its counterparts"

because it "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government").

In every real sense, the RAC does in fact take title: It takes possession, physical control, and the right to sell or give the raisins away. If it did not have title, it could not sell the raisins or use them as collateral. Producers retain not a claim on the reserve raisins themselves, but only a contingent interest in the pool of money left over after the RAC sells the raisins and uses the proceeds for its own purposes. 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h). As the Federal Circuit explained in *Lion Raisins, Inc. v. United States*, "once the raisins were transferred to the RAC, [the producer] no longer had a property interest in the raisins themselves, but only in its share of the reserve pool proceeds as defined by the regulations." 416 F.3d 1356, 1369 n.9 (Fed. Cir. 2005). That has heretofore been common ground.

But this Court need not determine whether the RAC actually takes title in any technical sense. When the government takes "'possession and control'" of property it is treated "*as if* the Government held full title and ownership." *Loretto*, 458 U.S. at 431; *United States v. United Mine Workers of Am.*, 330 U.S. 258, 284-85 (1947) (plurality) (similar). This Court's caselaw brims with cases identifying categorical physical takings when the government seizes the use and disposition of property, or occupies it, notwithstanding the property owner's retention of title. *See, e.g.*, *Loretto*, 458 U.S. at 438; *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *United States v. Pewee Coal*,

341 U.S. 114, 118-19 (1951); *United States v. Causby*, 328 U.S. 256, 266 (1946); *General Motors*, 323 U.S. at 383-84; *United States v. Russell*, 80 U.S. 623, 628 (1871); *see also Koontz*, 133 S. Ct. at 2600 (explaining that there is a per se taking "when the government commands the relinquishment of funds linked to a specific, identifiable property"); *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) ("Where the government authorizes a physical occupation of property (*or* actually takes title), the Takings Clause generally requires compensation.") (emphasis added). The RAC's seizure of the right to possess and dispose of the raisins thus amounts to a taking no matter who has formal title.

We anticipate that the government may argue that the Marketing Order does not effect a per se taking because the program's ostensible purpose is to benefit producers like the Hornes by stabilizing prices. Such an argument would be misplaced. Any benefit to raisin producers resulting from "price stabilization" — and we dispute that there is any net benefit — arises from the *volume* controls on free-tonnage raisins, not the compelled transfer of reserve-tonnage raisins to the RAC. Once market supply has been restricted, under no plausible economic theory do the Hornes or any other independent, non-exporting producer benefit by the crucial extra step of allowing the government to expropriate the reserve raisins, sell them or give them away (defeating the purpose of the volume control in the first place), and spend the money on subsidies for industry players who export raisins.

The Court must not simply *assume* that the Hornes gained any benefit from the program. There

is no evidence in the record to support such an assumption, and it requires an array of dubious economic assumptions to have any validity.[7] *See Bassett, New Mexico LLC v. United States*, 55 Fed. Cl. 63, 76 (2002) (refusing to apply an offset because the United States did not provide any evidence in the trial record to substantiate the alleged special benefit).

In any event, the claim of an offsetting benefit to the Hornes — if relevant in any way at all — would pertain only to calculating the amount of just

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[7] In order for a raisin grower who has lost 47% of his crop to the government to be better off, the price of raisins would have to almost double. There is no evidence in the record of such extraordinary price sensitivity. Moreover, if the volume controls actually have the effect of maintaining above-market prices, hence supracompetitive profits to growers, this would simply attract more producers into the industry, dissipating any benefits over the long run. Even in the shorter run, volume controls calculated as a percentage of crops already grown — in contrast to volume controls based on reducing acreage or production levels — have the perverse effect of stimulating production while discouraging marketing. Additionally, in order for the raisin reserve to benefit independent non-exporting growers, one would also have to assume that the RAC's own below-market sales and give-aways do not counteract the price effects of the volume controls. Finally, given that raisins grown abroad may be imported into the United States without being subject to the volume controls, there is at least some danger that volume controls hurt American farmers while driving up world prices, to the benefit of foreign growers.

We are not asking this Court to engage in economic calculations of this sort. We mention these complications just to make clear why the Court should not swallow wholesale any assertions the government may make that the Marketing Order benefits growers in the Hornes' position.

compensation, not to whether there was a per se taking in the first place. The amount of just compensation is not a point of contention in this case because the Department of Agriculture itself valued the property when it imposed a "dollar equivalent" fine on the Hornes. As the Court held in *Horne I*, there is no need for the Hornes to send money to USDA and then sue to get it back. 133 S. Ct. at 2063-64. The proper relief in this case is simply to reverse the USDA order, after which there will be no taking and no need for compensation.

B. The Procedural Posture Of This Case Does Not Make The Raisin Marketing Order Any Less A Categorical Taking.

Throughout this case, the government has persisted in asking a misleading question: What was taken? The answer is that nothing has been taken *yet*. The panel considered it legally significant that the Hornes have so far avoided any property changing hands. In the panel's view, "[b]ecause the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account," there was no "paradigmatic" physical taking, and the panel instead had to "enter the doctrinal thicket of the Supreme Court's regulatory takings jurisprudence." Pet.App. 15a-16a. Distinguishing this case in that way was error: The Hornes have raised the Fifth Amendment as a *defense* to an order that, if enforced, would be a per se taking. The applicable analysis is the same as if the government had actually obtained the Hornes' property.

No raisins have changed hands in this case because when the RAC's truck arrived to receive reserve-tonnage raisins, the Hornes refused to hand any raisins over. JA31-32. Instead, all the raisins processed at the Hornes' facility were sold directly to purchasers, and the proceeds were remitted to the raisin producers, who retained title to their raisins until the sale. Because the RAC was unable to physically obtain the reserve-tonnage raisins, USDA has imposed a fine in order to extract the value of those raisins and to penalize the Hornes for retaining and selling them.

The Ninth Circuit's approach has the effect of rendering this Court's decision in *Horne I* ineffectual. The panel's previous decision was that no court had jurisdiction to consider the Hornes' Takings Clause defense until after they had paid the fine and sued to get it back. Pet.App. 236a. This Court reversed, holding that the AMAA allows handlers to challenge alleged takings as a defense to a USDA enforcement action, without first disgorging raisins or money. *Horne I*, 133 S. Ct. at 2063 ("[I]t would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding.") (citing *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1988)). That holding tallies with this Court's explanation in *Koontz* that the government's "*command[]*" to relinquish money "linked to a specific, identifiable property interest" triggers a categorical takings analysis, not necessarily the payment itself. 133 S. Ct. at 2600 (emphasis added). But now the Ninth Circuit has resurrected a version of its prior position, holding that if the Hornes challenge the taking before it has actually taken

place, they lose the benefit of per se takings doctrine and are relegated to the "doctrinal thicket of ... regulatory takings jurisprudence." Pet.App. 16a. The courthouse door remains closed to the per se takings claim the Petitioners have been seeking to assert. Surely that is not what *Horne I* meant.

Both components of the fine imposed on the Hornes are legally equivalent to a physical taking. As to the dollar equivalent, this Court has held for more than a century that the government's assessment of the monetary value of property is itself analyzed as a taking. In *Village of Norwood v. Baker*, city officials realized they could not seize a strip of land for a municipal street expansion project without paying compensation, and instead imposed an "assessment" of "a sum equal to that paid for the land taken for the street" plus "the costs and expenses connected with the condemnation proceedings." This Court treated that as just as much a taking as if the city had taken the land itself. 172 U.S. 269, 271 (1898).

The Court reaffirmed that principle only two years ago in *Koontz*. As the majority in *Koontz* explained, "when the government commands the relinquishment of funds linked to a specific, identifiable property interest ... a 'per se takings approach' is the proper mode of analysis under the Court's precedent." 133 S. Ct. at 2600 (alteration omitted). Although the Court in *Koontz* divided on other issues, this point was unanimous. *See id.* at 2608-09 (Kagan, J., dissenting) (explaining that *Village of Norwood* "prevent[s] circumvention of the Takings Clause by prohibiting the government from imposing a special assessment for the full value of a

property in advance of condemning it"). The monetary value (or "dollar equivalent") portion of the fine is a textbook example of a "government command[]" to "relinquish[] funds linked to a specific, identifiable property interest"; it must therefore be analyzed as a per se taking.

As to the penalty component of the fine, an almost equally longstanding line of cases holds that fines for refusal to submit to unconstitutional takings may be challenged under the Takings Clause just as surely as a physical seizure. In *Missouri Pacific Railway Co. v. Nebraska*, the Court analyzed as a taking — and reversed — a fine imposed on a railroad for refusal to surrender property for a grain elevator. 217 U.S. 196, 205-08 (1910) (Holmes, J.). That aligns with well-understood principles of constitutional remedies. The government can violate a constitutional right in two ways: by preventing its exercise or by penalizing its exercise. The government can prevent a speaker from speaking or it can fine her for exercising her right to speak; both actions violate the freedom of speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). By the same token, sometimes the government sends in its trucks and takes raisins without compensation, and sometimes it fines the raisin handler for refusing to turn them over. Both actions equally violate the Takings Clause. *Missouri Pac. Ry.*, 217 U.S. at 205-208; *Wilkie v. Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting) ("Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing.").

In short, for purposes of determining whether a per se taking is involved, it does not matter whether the government takes the raisins or their monetary equivalent, and it does not matter whether the taking occurs before or after the property owner has his day in court. The constitutionality of the fine "rises or falls on the constitutionality of the Marketing Order's reserve requirement" and attendant transfer of reserve raisins to the RAC. Pet.App. 13a.

II. THE NINTH CIRCUIT'S REASONS NOT TO FIND A CATEGORICAL TAKING ARE WITHOUT MERIT.

The panel's conclusion that the Raisin Marketing Order did not work a categorical physical taking in this case led it to "enter the doctrinal thicket of the Supreme Court's *regulatory* takings jurisprudence" rather than enforcing the straightforward "categorical requirement" of compensation for a straightforward taking of private property for a public use. Pet.App. 16a (emphasis added). In the course of its wanderings, the panel left an extraordinary trail of doctrinal misunderstanding.

A. The Fifth Amendment's Categorical Duty To Compensate Physical Takings Applies To Takings Of Personal Property.

The panel began its analysis with the observation that "[t]he Marketing Order operates against personal, rather than real, property." Pet.App. 18a. "Because the Takings Clause undoubtedly protects personal property," the panel acknowledged, "this distinction does not mean the Takings Clause is inapplicable." *Id.* But the panel read this Court's

decisions in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Loretto* to "make clear the Takings Clause affords more protection to real than to personal property." Pet.App. 19a. Specifically, the panel concluded that *Loretto*'s application of per se taking status to permanent physical occupations does not "govern controversies involving personal property." Pet.App. 20a.

Under the panel's holding, the government has a categorical obligation to pay just compensation for a seizure of one's house, but it can take away one's car, furniture, refrigerator, books, silver, and clothes subject only to balancing tests applicable to regulatory takings. *See, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). For all of that property, the panel would write away the central bulwark of the Fifth Amendment.

It bears mention that this holding was the panel's own creation; the government has never argued that takings of personal property cannot be per se takings, and it tellingly refrained from adopting or defending this portion of the decision below in its Brief in Opposition. We nonetheless will address the argument despite suspecting that there is no genuine dispute between the parties on this ground.

The panel's holding that takings of personal property cannot be per se takings contradicts the precedents of this Court and all other federal appellate courts to consider the question and violates both the history and the text of the Fifth Amendment.

1. The panel's decision contradicts this Court's binding precedent.

This Court has never held — or even hinted — that personal property is not subject to per se Takings Clause principles, and many times it has held the contrary. For example, the Court categorically required compensation for taking "fixtures," including removable "trade fixtures," on the ground that "[a]n owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected." *General Motors*, 323 U.S. at 383-84; *see United States v. Burnison*, 339 U.S. 87, 93 n.14 (1950) ("An authorized declaration of taking or a requisition will put realty *or personalty* at the disposal of the United States for 'just compensation.'") (emphasis added). This is black letter law. 2-5 Nichols on Eminent Domain § 5.03(5)(d) (3d ed. 2014) ("Compensation must be paid to all owners who have had their tangible personal property taken as a result of eminent domain."). Indeed, the Court routinely applied Takings Clause protections to personal property even before regulatory takings were covered by the Clause at all. *See Russell*, 80 U.S. at 628 (federal seizure of use of steamboats during the Civil War); *United States v. Palmer*, 128 U.S. 262, 271 (1888) (federal use of a patent).

More recently, this Court has applied the per se taking rule when the government seizes fungible personal property such as money. In *Webb's Fabulous Pharmacies*, this Court applied a per se analysis to appropriation of interest in an

interpleader fund. As the Court explained, "a State, by *ipse dixit*, may not transform private property into public property without compensation." 449 U.S. at 164. Similarly, in *Koontz* the Court stated that "when the government commands the relinquishment of funds linked to a specific, identifiable property interest ... , a 'per se takings approach' is the proper mode of analysis under the Court's precedent." 133 S. Ct. at 2600 (alteration omitted) (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)). By the same token, intangible property such as a bondholder's contractual rights "are a form of property and as such may be taken for a public purpose *provided that just compensation is paid*," *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (emphasis added); *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960) (taking of liens on shipbuilding materials); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 10 (1949) (taking of the intangible "going concern value" of a business).

Circuit court decisions have been even more explicit in rejecting the argument that personal property is not protected by per se takings doctrine. In *Nixon v. United States*, the United States "argue[d] that the per se takings doctrine applies only to the physical occupation of real property," and so was inapplicable to the papers of President Richard Nixon. 978 F.2d 1269, 1284 (D.C. Cir. 1992). The appellate court rejected that argument as "fail[ing] for want of authority or logic." *Id.* Imposing a distinction between personal and real property "would be purely artificial," for "[o]ne may be just as permanently and completely dispossessed of personal property as of real property." *Id.* at 1285. Finding

that a per se taking of the presidential papers had occurred, the court concluded that "the constitutional remedy of just compensation is required," and remanded "for a determination of compensation due." *Id.* at 1287.

Similarly, in *Cerajeski v. Zoeller* the Seventh Circuit held that a State's "confiscation" of interest in a bank account was a taking for which compensation was categorically owed. 735 F.3d 577, 580, 583 (7th Cir. 2013). In reaching that conclusion, the court analogized the taking to a neighbor who occupies an apple orchard and physically takes the apples. *Id.* at 580; *see also Warner/Elektra/Atl. Corp. v. County of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1993) ("It is rare for American governments to requisition personal property, but sometimes they do so and when they do they have to pay just compensation."). In *Anderson v. Spear*, the Sixth Circuit held that a law requiring political campaigns to turn over leftover contributions to the State after an election was a physical taking automatically requiring just compensation. 356 F.3d 651, 668-69 (6th Cir. 2004) (citing, *e.g.*, *Brown*, 538 U.S. 216). Decades ago, the Fifth Circuit applied a per se taking analysis to a federal appropriation of Lee Harvey Oswald's "personal effects," *Porter v. United States*, 473 F.2d 1329, 1331 (5th Cir. 1973), and the Tenth Circuit applied it to a taking of fish farmed on condemned land, *see United States v. Corbin*, 423 F.2d 821, 824 (10th Cir. 1970). *See also Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (Selya, J., concurring in the judgment) ("Limiting per se takings analysis to cases involving real property is a crude boundary with no compelling basis in the law.").

In holding that the per se taking rule applies only to real property, the Ninth Circuit stands alone.

2. The panel's decision is inconsistent with the Takings Clause's history and text.

The Ninth Circuit's interpretation conflicts with the history and text of the Takings Clause. As an historical matter, uncompensated takings of personal property such as horses, vehicles, food, blankets, and supplies by the army likely were the animating events that led to the Takings Clause. Henry St. George Tucker, author of the first treatise on the United States Constitution, observed that the Takings Clause was "probably" enacted in response to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever." 1 Henry St. George Tucker, *Blackstone's Commentaries* app. at 305-06 (1803). As early as 1778, John Jay, later first Chief Justice of the United States, wrote an essay decrying the practice by military quartermasters in New York of impressing "horses, teems [sic], and carriages" without the protections of the law. John Jay, A Freeholder, *A Hint to the Legislature of New York* (1778), *reprinted in* 5 *The Founders Constitution* 312, 312-13 (Philip B. Kurland & Ralph Lerner eds., 1987). Yale law professor Jed Rubenfeld has written that the "founding generation" enacted the Takings Clause in large part because of their concern with "the appropriation of private property to supply the army during the Revolutionary War." Jed Rubenfeld, *Usings*, 102 Yale L.J. 1077, 1122 (1993). Early

commentators concurred. *See* John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 53 (2d ed. 1900) ("In regard to personal property, no question can ordinarily arise. It is seldom necessary to appropriate it, but if appropriated, it is *taken*[.]"); Thomas M. Cooley, *General Principles of Constitutional Law in the United States of America* 336 (1880) ("The property which the Constitution protects is anything of value which the law recognizes as such[.]").[8]

Indeed, protection of personalty — and especially of farmers' crops — has been a central concern of takings jurisprudence since the Magna Carta. One provision of that fountainhead of Anglo-American constitutionalism provided that "[n]o constable or other of Our bailiffs shall take corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment." Magna Carta, ch. 28 (1215), *reprinted in* A.E. Dick Howard, *Magna Carta: Text and Commentary* (1964). In the colonial era, Section 8 of the Massachusetts Body of Liberties (1641) protected personal property *alone* from uncompensated

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[8] Since the federal government did not assert the power of eminent domain within the States until 1864, *see* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1741, 1784 (2013) (citing *Kohl v. United States*, 91 U.S. 367 (1875)), the principal applications of the Fifth Amendment for much of its first century were in cases of impressments of personal property and exercises of eminent domain with respect to land in the federal district and the territories. In the territories, there were few occasions for the exercise of eminent domain because the federal government already owned much of the land and rarely needed to take it from private owners.

takings. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 785 (1995). The Ninth Circuit's notion that personal property enjoys "less protection" than realty from uncompensated appropriations and invasions (Pet.App. 18a) has it backwards.

The very language of the Takings Clause should suffice to condemn the Ninth Circuit's interpretation. Few questions of semantic meaning are unequivocal, but this one is. Doctor Johnson's esteemed dictionary defined property, most relevantly, as "[r]ight of possession," "[p]ossession held in one's own right," and "[t]he *thing* possessed." 2 Samuel Johnson, *Dictionary of the English Language* (6th ed. 1785) (emphasis added). Noah Webster defined property as "[a]n estate, *whether in lands, goods or money*," and even included as examples of property "the productions of [one's] farm or ... shop[.]" Noah Webster, *American Dictionary of the English Language* (1828) (emphasis added). Shortly after the adoption of the Bill of Rights, James Madison wrote that "a man's land, or merchandize, or money is called his property," and is entitled to various protection including that "none shall be taken directly even for public use without indemnification to the owner." James Madison, *Property* (1792), *reprinted in* 14 *The Papers of James Madison* 266-68 (R. Rutland ed., 1977) (emphasis omitted).

It is also significant that where the term "property" appears elsewhere in the Constitution — such as the Property Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments — it unquestionably includes personal and real

property equally. *See* U.S. Const. art. 4, § 3, cl. 2; U.S. Const. amends. V, XIV; *see also Fuentes v. Shevin*, 407 U.S. 67, 84 (1972). There is simply no support in public meaning or technical legal usage for the notion that personal property is inferior in status or degree of protection to real property.

3. The panel's rationale misconstrues *Loretto* and *Lucas*.

The panel did not engage in any analysis of the underlying history or logic of the Takings Clause, but rested its idiosyncratic interpretation entirely on distinctions between this case and *Loretto* and *Lucas*. Pet.App. 20a. The most basic flaw in that approach is that *Loretto* and *Lucas* — however important — are not necessary for cases where, as here, the government seizes a possessory interest in the disputed property. Long before *Loretto*, the compelled transfer of a possessory interest in private property to the government was recognized as a Fifth Amendment taking. To establish that per se takings jurisprudence does not apply to personalty, the panel would have had to deal with *Russell*, *Palmer*, *General Motors*, *Webb's Fabulous Pharmacies*, and other cases of that ilk — and not merely *Loretto* and *Lucas*.

Although *Loretto* happened to involve real property, neither its holding nor its reasoning was so limited. As the D.C. Circuit explained in *Nixon*, "the actual holding of *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that might justify such a distinction." 978 F.2d at 1284. According to the court below, *Loretto*'s citation of

"[t]he placement of a fixed structure on land or real property" as an "example" of a per se taking demonstrates that the case has a "narrow reach" that does not "extend" to personal property. Pet.App. 20a (emphasis omitted). But it can hardly be that when this Court illustrates its holding with an example, it impliedly excludes other possible examples.[9]

What the *Loretto* Court actually *said* was that "when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred." 458 U.S. at 426. In portions of its opinion ignored by the panel below, the Court left no question that governmental confiscation of personal property is a classical taking as well. Quoting one scholar who had "accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence," the Court agreed that "'one incontestable case for compensation ... seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space *or a thing* which theretofore was understood to be under private ownership.'" *Id.* at 427 n.5 (emphasis added) (quoting Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of*

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[9] The panel also cited *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 854 (9th Cir. 2001) (en banc), for the proposition that "[t]he per se analysis has not typically been employed outside the context of real property," Pet.App. 20a, overlooking that this Court, in reviewing the Ninth Circuit's decision in that case, stated that a per se analysis was appropriate for money, which is a form of personal property. *Brown*, 538 U.S. at 235.

"Just Compensation" Law, 80 Harv. L. Rev. 1165, 1184 (1967)).

The panel attempted to distinguish *Loretto* in various ways, none of them even passably convincing. One was that most (though not all) of the *Loretto* Court's precedents involved real property. Pet.App. 20a; *but see Loretto*, 458 U.S. at 435 (citing *General Motors*, 323 U.S. 373). True, but irrelevant; many per se takings cases before and since *Loretto* involved personal property. *See supra* at 32-35. Nor does it matter that the *Loretto* Court also pointed out that physical occupations are subject to "relatively few problems of proof." Pet.App. 20a (quoting *Loretto*, 458 U.S. at 437). An appropriation of personal property is not subject to serious factual disputes either. *See* Lewis, *Eminent Domain* § 53 ("In regard to personal property, no question can ordinarily arise."). This Court has found effective government possession of property where proof is much harder. *E.g.*, *United States v. Causby*, 328 U.S. 256 (1946) (per se taking caused by airplane overflights). Assuredly, it can be tricky to determine whether a physical intrusion — a form of trespass — assumes the "extreme form" of a "permanent occupation" as in *Loretto*. But where the government takes *possession* of a piece of property, as here, the taking is obvious.

The panel's reliance on *Lucas* to interpret *Loretto* reflects its confusion between the separate categories of physical and regulatory takings. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). *Lucas*, in contrast to this case, involved a restriction on the owner's permissible use of property — not a transfer of possession or use to the government itself. Its signal contribution to this Court's takings

jurisprudence was to make clear that a per se taking occurs not only in cases of "physical invasion," but *also* "where regulation denies all economically beneficial or productive use of land" — in other words, that certain land-use regulations are treated *like* physical invasions. 505 U.S. at 1016.

That is irrelevant to this case, because it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' *and vice versa*." *Tahoe-Sierra*, 535 U.S. at 323-24 (emphasis added).[10] *Lucas* is thus beside the point where the government takes "possessory and dispositional control" of property. Pet.App. 25a-26a. By applying regulatory takings law to limit *Loretto* to real property, the panel did exactly what this Court said it must not do.

B. The Fifth Amendment Does Not Allow The Government To Avoid Its Categorical Duty By Pointing To Speculative Benefits.

The panel's second rationale for treating the Raisin Marketing Order as subject only to a balancing test is that "the Hornes did not lose all economically valuable use of their personal property," because they "retain the right to the proceeds from [its] sale." Pet.App. 20a-21a. The undisputed fact that the "right to the proceeds" often amounts to *nothing* (as in 2003-04) did not dissuade

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[10] The courts of appeals have concurred. *R & J Holding Co. v. Redevelopment Auth. of the Cnty. of Montgomery*, 670 F.3d 420, 431 (3d Cir. 2011); *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1365 & n.6 (Fed. Cir. 2012).

the panel: "[E]ven in years in which producers receive no equitable distribution of the RAC's net profits," it said, "the reserve raisins continue to work for the Horne's benefit" because they "fund[] the administration of a an industry committee tasked with (1) representing raisin producers, such as the Hornes, and (2) implementing the reserve requirement, the effect of which is to stabilize the field price of raisins." Pet.App. 21a-22a. This rationale has two related flaws. It confuses the rule for actual physical takings, like this, with the rule for regulatory takings. And it suggests that the possibility of speculative and unsubstantiated benefits can obviate the constitutional requirement of just compensation for a taking of property.

The panel's reasoning presupposes that a seizure — apparently even of real property — can be a per se taking *only* if it deprives the owner of "*all* rights associated with the [property]." Pet.App. 21a-22a (emphasis added). The question whether a purported taking deprives the owner of all the property's valuable uses arises, however, only in the context of *regulatory* takings, where the property owner retains possession: When a regulatory taking effects a total deprivation of value, it is treated *as if* the government had actually taken possession of the property. *See Lucas*, 505 U.S. at 1016. But that has no bearing on how a court should treat a taking of *actual* "possessory and dispositional control," as the panel acknowledged happened here. Pet.App. 25a-26a.

On the contrary, as this Court has explained, in cases where the government takes possession of property a court "*do[es] not ask* whether [the seizure]

deprives the owner of all economically valuable use[.]" *See Tahoe-Sierra*, 535 U.S. at 323 (emphasis added). If the government takes possession and control of one acre of a hundred-acre farm to build a post office, the fact that the property owner still has 99 acres left does not mean that no physical taking occurred, and certainly does not relieve the government of its categorical obligation to pay just compensation for what it has taken. By the same token, if it takes raisins (or their monetary equivalent) it has to pay for what it has taken, even if some economically valuable property interests are left.

Loretto underlines the point. There, when the government required apartment-building owners to permit installation of cable boxes, 458 U.S. at 422, the specific property taken — rectangular areas of a building's exterior about the size of a breadbox — retained the obvious economically valuable use of sealing the building from the elements. Yet that made no difference to the Court's holding that the physical occupation was a categorical taking requiring compensation. *Id.* at 438 & n.16; *see also Kaiser Aetna*, 444 U.S. at 179-80 (requiring private marina to admit the public is a categorical taking even though the marina continued to have economic value).

As with its arbitrary exclusion of personal property from the realm of per se takings, the Ninth Circuit stands alone in holding that takings of "possessory and dispositional control" do not categorically require compensation unless they deprive the owner of all economically valuable use. Pet.App. 25a-26a. The Federal Circuit, for example,

has explained that even when the government "only partially impair[s]" ownership and possession of property, "in the physical taking jurisprudence *any* impairment is sufficient." *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) (emphasis added). The Eleventh Circuit held in *Gulf Power Co. v. United States* that a requirement that electrical utilities allow telecommunications carriers access to their physical networks constitutes a physical taking, even though the networks retained economic value. 187 F.3d 1324, 1328 (11th Cir. 1999). When there has been an actual physical taking, it does not matter whether the property retains some economically valuable use; the government must pay for what it takes.

The second flaw in this rationale is the panel's assumption that the mere possibility of benefits — even if wholly speculative and unsupported on the record — obviates the constitutional necessity of compensation. Benefits to a property owner from a physical taking can bear on the just compensation that must be paid, but it has no bearing on whether a physical taking has taken place.

State and federal courts have developed a narrow doctrine under which proven "special benefits" accruing to the property owner may be deducted from what would otherwise be just compensation. *See, e.g., Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 150-51 (1974); *Bauman v. Ross*, 167 U.S. 548, 584 (1897); 8A Nichols on Eminent Domain § 8A.02. When the property owner benefits personally, those special benefits might be credited against the compensation due, but it does not mean there is not a categorical taking. *See, e.g., Village of*

Norwood, 172 U.S. at 279; *see also Tahoe-Sierra*, 535 U.S. at 303 (existence of a regulatory taking is a "different and prior question" separate from compensation).

It is well established, meanwhile, that generalized public benefits that result from a taking have no bearing on *either* the right to or quantum of just compensation. As this Court said in *Monongahela Navigation Co. v. United States*, the Takings Clause "excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated[.]" 148 U.S. 312, 326 (1893). In *Armstrong*, the Court reiterated that "[t]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." 364 U.S. at 49. It is possible that the Raisin Marketing Order benefits *someone* — not consumers, surely, and not small independent farmers, but perhaps larger handlers engaged in the export trade, beneficiaries of donations of raisins to school lunch programs, and the like — but the Hornes must not be saddled with the cost of those social gains. The court below confused general social benefits and implicit in-kind compensation with whether compensation is required in the first place.

Even to be credited against the amount of compensation, special benefits must be *proved*. *See Bassett, New Mexico*, 55 Fed. Cl. at 75-76. We have no quarrel with the proposition that any payments

made to producers from the proceeds of sale of reserve raisins should be credited.[11] But the Ninth's Circuit's claim that the Hornes benefitted from being "represent[ed]" by the RAC and from implementation of the raisin reserve (Pet.App. 21a), is supported by nothing in the record. The government should not be permitted to avoid compensation for physical takings of property by vague and highly disputable references to the program's ostensibly beneficent purposes — as if there were no such things as special interest legislation, agency capture, and faction.

Equally problematic is the Ninth Circuit's claim that "the Horne's rights with respect to the reserved raisins are not extinguished because the Hornes retain the right to the proceeds from their sale," even though "the equitable distribution may be zero." *Id.* If affirmed by this Court, this holding would enable the government to take valuable property of any variety, sell it, use the proceeds for governmental purposes (including subsidies to other people), and pay the owners little or nothing — on the theory that the owner retains an "equitable stake" in whatever proceeds might be left. This allows the government to escape from its categorical duty to pay *just* compensation by holding out the possibility (and not even the guarantee) of *inadequate* compensation. That bears no resemblance to the dictates of the Fifth Amendment.

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[11] The ALJ and JO orders did not credit the Hornes with their share of the proceeds from the 2002-03 raisin crop, so in fact they received no benefit.

C. The Fifth Amendment Does Not Permit Confiscations Of Private Property To Be Recast As Permissible Use Restrictions.

Finally, the panel concluded that "the most faithful way to apply the Supreme Court's precedents to the Hornes' claim" is "to hold that the reserve requirement constitutes a use restriction on the Hornes' personal property and then analogize that use restriction to the land use permitting context." Pet.App. 23a. The court reasoned that "the reserve requirement is a use restriction applying to the Hornes insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. The Secretary did not authorize a forced seizure of the Horne's crops, but rather imposed a condition on the Hornes' *use* of their crops by regulating their sale." Pet.App. 25a (emphasis in original). Applying a "'nexus and rough proportionality'" test, Pet.App. 22a-23a, which this Court developed in the "special context" of land-use permitting, *see Lingle*, 544 U.S. at 538; *Koontz*, 133 S. Ct at 2591, the panel determined that the Raisin Marketing Order does not effect a taking at all, Pet.App. 29a.[12] That analysis contradicts the law of this Court.

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[12] The panel asserted that the government "urge[d]" that approach. Pet.App. 23a. That is not so. On the contrary, the government argued at length in its Ninth Circuit supplemental brief that the land-use permitting test does *not* apply. *See* U.S. Supp. Br. at 8, *Horne v. USDA*, No. 10-15270 (9th Cir. Aug. 13, 2013) ("[T]he marketing order is not a land-use permit application process."); *id.* at 8-12 (discussing the land use exaction analysis in *Koontz*). The government only suggested in the alternative, in a single paragraph, that the test would be satisfied *if it did* apply. *Id.* at 12.

Time and again, this Court has rejected the panel's premise that what would be a physical taking of property if done directly — a "forced seizure," in the panel's words, Pet.App. 25a — becomes a mere use restriction if the taking is imposed as "a condition on the Hornes' use" of their raisins in commerce. *Id.* This Court addressed a similar argument in *Loretto*, where the appellee companies claimed that installation of facilities on private property was "simply a permissible regulation of the use of real property." 458 U.S. at 438-39. Justice Marshall flatly dismissed that assertion:

> It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. Teleprompter's broad "use-dependency" argument proves too much. For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

Id. at 439 n.17. As the Court observed in *Nollan*, to say that such an appropriation of property is "'a mere restriction on its use' is to use words in a manner that deprives them of all their ordinary meaning." 483 U.S. at 831 (citation omitted); *see also Dolan*, 512 U.S. at 385; *Koontz*, 133 S. Ct. at 2594-95, 2598-99.

Indeed, the Court explicitly rejected the panel's premise as early as *Union Pacific Railroad Co. v. Public Service Commission of Missouri*, 248 U.S. 67 (1918) (Holmes, J.). In that case, the state supreme court justified what would ordinarily have been an unconstitutional exaction on the ground it was imposed as a condition on a permit that the company "voluntar[ily]" chose to obtain. *Id.* at 70. The Court responded that "it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary." *Id.* Here, USDA demanded the transfer of reserve-tonnage raisins as a condition to permitting sale of the rest. True, it would be "worse" for the Hornes not to be able to sell raisins at all, but it was error for the Ninth Circuit to regard this exaction as a product of "voluntary choice."

Following this Court's lead, the Eleventh and Federal Circuits have refused to treat seizures of physical possession as use restrictions. In *Gulf Power*, the Eleventh Circuit addressed a government requirement that utility companies provide telecommunications carriers and cable companies with access to their property. In holding that the requirement was a physical taking like the one in *Loretto*, the Eleventh Circuit rejected the argument

that the mandatory-access provision is a permissible "regulatory condition" of use that the electric utilities could "avoid ... by refraining from using their poles, ducts, conduits, and rights-of-way for wire communications." 187 F.3d at 1331. As the court explained, that argument was "foreclosed by *Loretto*," which holds that "[t]he protection against a permanent, physical occupation of one's property does not hinge on the choice of use for that property." *Id.*

The Federal Circuit rejected the same argument in *Casitas Municipal Water District*. There, the government required a water-control project to physically and permanently divert some of the water it had beneficial use of so that the government could operate a "fish ladder" to preserve an endangered species. Concluding that this was a physical taking automatically requiring just compensation, the court rejected the government's argument that its requirement "was merely a use restriction on a natural resource, and therefore governed by the regulatory taking jurisprudence." 543 F.3d at 1293. The "restriction of use cases cited by the government" were simply inapplicable because "this case involves physical appropriation by the government." *Id.* at 1294. Like the raisin growers' confiscated raisins, "[t]he water, and [the owner's] right to use that water, is forever gone." *Id.* at 1296.

The nature of a taking depends on what kind of property interest is invaded — whether a possessory interest, as here; the right to exclude, as in *Loretto* or *Kaiser Aetna*; or the right to beneficial economic use, as in *Lucas*. It does not depend on the mechanism by which the taking is enforced — whether compulsory

seizure, trespassory invasion, fine or other punishment, or denial of the right to engage in commerce. In particular, the taking of a possessory interest in private property is not transmuted into a "use restriction" because the Hornes wished to use it in commerce. *Koontz*, 133 S. Ct. at 2594-95, 2598-99; *Loretto*, 458 U.S. at 439 n.17; *Union Pac.*, 248 U.S. at 70. As explained above, it may well be that if the USDA merely limited the amount of a crop that a farmer can sell, that would be a use restriction. But the Raisin Marketing Order is not of this description. *See Evans*, 74 Fed. Cl. at 558. The panel thus confused seizure of ownership of property, even when imposed as a condition on engaging in business, with a legitimate regulatory limitation on property use.

The panel justified equating this physical transfer of raisins with a use restriction by analogy to cases involving *regulatory* takings, *see Yee*, 503 U.S. at 524-25 (rent control ordinance), or conditions on a government benefit, *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006 (1984) (requirement for surrender of trade secrets as part of pesticide registration application); *see also Nollan*, 483 U.S. at 833 n.2 (distinguishing *Ruckelshaus* as not involving a true use restriction). That yet again collapses this Court's longstanding distinction between regulatory and physical takings. *See supra* at 43-44.

Far from supporting the panel, *Yee* in fact reaffirmed *Loretto*, citing the *very language* that squarely contradicts the panel's holding. *See* 503 U.S. at 531-32 (quoting *Loretto*'s footnote 17 with approval). As *Yee* explained, "[h]ad the city required such [a physical] occupation, of course, petitioners would have a right to compensation, and the city

might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right." *Id.* at 532. And *Yee* reaffirmed that the government's categorical duty of just compensation when it "actually takes title" to property is "distinct" from its duty to compensate when it "merely regulates the use of property." *Id.* at 522.

Instead of applying cases establishing that the government may not exact physical property without compensation under the guise of a "use restriction," the panel applied a different line of cases providing that "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 133 S. Ct. at 2591 (citing *Nollan* and *Dolan*). Under the panel's view, that test is the general rule governing "conditional exaction[s]" in return for a "government benefit," in cases which "involve choice" about the use of property. Pet.App. 25a-26a.

This Court has rejected the Ninth Circuit's argument. In reality, *Nollan* and *Dolan* represent an *exception* to the general rule that the government's demand for physical property must be analyzed as a per se taking, not a use restriction; that exception applies only in the "special context" of land-use permitting, *Lingle*, 544 U.S. at 538, and has never been "extended" beyond that context, *see City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). What distinguishes land use permitting, as this Court has explained, is the government's wide discretion to grant or deny

permission for given property uses on a case-by-case basis; the infinite range of public costs that can result from particular uses; the potential of "dedications of property" for public use to "offset" those harms; and the great value of the permitting process to landowners. *Koontz*, 133 S. Ct. at 2594-95. Those factors create an unusual need for discretion in setting land use conditions, and a special risk that the government will use that discretion to extort property without compensation, effectively depriving property owners of their Fifth Amendment rights. The "nexus" and "rough proportionality" test of *Nollan* and *Dolan* applies the doctrine of unconstitutional conditions to cabin the government's discretion. *Id.*

The unique considerations of land use do not apply here. The Marketing Order does not confer a "benefit" at all. As the Court noted in *Nollan*, "the right to build on one's own property — even though its exercise can be subjected to legitimate permitting requirements — cannot remotely be described as a 'governmental benefit.'" 483 U.S. at 833 n.2. The Order does not establish a discretionary permitting regime, and there are no public harms from the sale of free-tonnage raisins that dedication of reserve-pool raisins for public use might offset. The question of whether to set a raisin reserve equally applicable to all raisin growers is thus different from the myriad considerations — aesthetic, environmental, social, political — involved in whether to issue a land use permit to a particular applicant with respect to a single parcel of land. Simply put, a land use permitting board's need for discretion to demand easements on property is different in kind from the RAC's largely mechanical decision whether to seize

raisins. In the absence of those considerations, the special rule of *Nollan* and *Dolan* does not apply, but rather the general exactions rule established in cases such as *Loretto*.

Even if *Nollan* and *Dolan* did apply to a regulation such as the Raisin Marketing Order, the "nexus" and "rough proportionality" test they stand for could not be met. In those cases, the permitted land use inflicted an injury on the public; this Court held that a permit could be conditioned on transfer of a property right to the government, but that any such relinquishment must be limited to property interests that mitigate or cure that precise injury. *See Dolan*, 512 U.S. at 387-88. Here, the production and sale of raisins inflicts no injury on the public (but only greater competition), and thus there is no need for the public to get free raisins as an offset.

Even if we imagine that the sale of raisins inflicts a kind of "injury" on other growers by creating competitive price pressure, seizure of the reserve raisins has no connection whatever to the government's desire to "stabilize" raisin prices. A limitation on the quantity of raisins to be sold might have a nexus to that interest, but the crucial additional step of transferring ownership of raisins to the government — especially when the government uses those raisins itself or sells them back into the market for the purpose of subsidizing other players in the industry — does not.

By the same token, seizure of raisins as opposed to volume controls or other regulations is not "proportional" to any public need. Indeed, the issue here is almost identical to that in *Dolan*. In that case, a landowner applied for a permit to pave a

parking lot in a flood zone. The municipality attached a condition: that she dedicate a portion of her property to the public as a public greenway. This Court held that the demand was not proportional to the problem of flood control because a private greenway could have served the same purpose without eliminating the property owner's right to exclude. 512 U.S. at 393. The same analysis applies here. The government may have authority to tell raisin growers not to sell their whole crop, but requiring them to transfer possession of raisins to the RAC is not proportional to that purpose.

The panel sought to downplay the practical impact of its holding by noting that the Hornes "can avoid the reserve requirement of the Marketing Order by ... planting different crops, including other types of raisins, not subject to this Marketing Order or selling their grapes without drying them into raisins." Pet.App. 25a-26a. That is of no significance; the property owner in *Loretto* could have avoided the taking "by ceasing to rent the building to tenants," 458 U.S. at 439 n.17, and the owner of the pond in *Kaiser Aetna* could have avoided imposition of a navigational servitude by not connecting the pond to interstate waters, 444 U.S. at 165-66.

Under the Ninth Circuit's theory, the government can extract whatever property concessions it wants by effecting takings as a condition on the "government benefit" of not being forbidden to do anything the government has power to forbid. Pet.App. 26a. There would be no end of circumstances where the government could deprive property owners of "possessory and dispositional control," under this theory, Pet.App. 23a n.18, 25a-

26a, subject only to analysis applicable to use restrictions rather than a categorical compensation requirement. *See, e.g.*, *Loretto*, 458 U.S. at 439 n.17 (rejecting the defendant's argument in part because "[i]t would even allow the government to requisition a certain number of apartments as permanent government offices").

The panel's decision ultimately stands for the proposition that the government can take farmers' property as a condition of its grace in allowing them to sell part of their crop. Not since the barons prevailed at Runnymede has that been the law.

* * *

In the typical Takings Clause case where the lower court holds that there is no need for compensation because there was no taking, and this Court reverses, the case is remanded to determine the amount of just compensation due. No such remand is required here. Because Petitioners invoked the Takings Clause as a defense to a USDA order, as is permitted under the AMAA, *see Horne I*, 133 S. Ct. at 2063, no further proceedings are necessary except to hold that the dollar equivalent and penalty portions of the USDA order were unlawful. *See supra* at 12-13.

CONCLUSION

For the foregoing reasons, the Court should reverse the court of appeals and remand with instructions to remand to USDA to vacate fines imposed for noncompliance with the requirement to transfer reserve-tonnage raisins to the RAC.

Respectfully submitted,

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